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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLEN PIMENTEL, Plaintiff and Appellant, v. PACIFIC SPECIALTY INSURANCE COMPANY, Defendant and Respondent.	D048969 (Super. Ct. No. GIC840644)
MICHAEL MATHIAS Plaintiff and Appellant, v. PACIFIC SPECIALTY INSURANCE COMPANY, Defendant and Respondent.	D048969 (Super. Ct. No. GIC848129)

APPEALS from a judgment of the Superior Court of San Diego County, Patricia Yim Cowett, Judge. Affirmed.

After Allan Pimentel and Michael Mathias entered into a stipulated judgment deeming Mathias liable for an injury to Pimentel and assessing over $500,000 in damages, Pimentel and Mathias each sued Mathias's insurer, Pacific Specialty Insurance Company (PSIC), seeking payment of the judgment and alleging that PSIC, in bad faith, refused to defend and indemnify Mathias for Pimentel's claim. All parties moved for summary judgment/adjudication, and the trial court, after granting Mathias's motion for consolidation, denied Mathias's and Pimentel's motions and granted PSIC's motion.

In this appeal Mathias and Pimentel challenge the trial court rulings, which were based on the ground that the insurance coverage sought by Mathias and Pimentel was for a loss resulting from a battery committed by the insured, Mathias, and was consequently a "loss caused by a wilful act" for which coverage was precluded under Insurance Code section 533.[1] As discussed below, we agree with the trial court's ruling. The undisputed facts established that the loss at issue was caused by Mathias's intentional, wrongful and inherently harmful act, and thus section 533 precluded any potential for insurance coverage as a matter of law. Consequently, PSIC had no obligation to defend or indemnify Mathias, and summary judgment was proper.

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1 All statutory references are to the Insurance Code unless otherwise specified.

I

FACTS

On October 22, 2002, Pimentel was seated at M.J.'s bar in Chula Vista. Mathias entered the bar and saw Pimentel speaking with Mathias's fiancée. Mathias, who did not know Pimentel, approached him from the rear. Mathias then placed his hands on the lapels of Pimentel's jacket, and began pulling him around on his bar stool in an effort to force Pimentel to face Mathias. Startled by Mathias's actions, Pimentel attempted to stand up while Mathias was pulling him, lost his balance and fell to the ground. Pimentel injured his ankle in the fall.

Approximately one year after the incident, Pimentel filed suit against Mathias alleging causes of action for negligence and battery. Mathias reported the claim to his insurance company, PSIC, seeking to invoke a provision of his homeowner's insurance that would require PSIC to defend the claim and indemnify him for any liability. After speaking with Mathias regarding the incident and reviewing the complaint, PSIC denied the claim and refused to defend Mathias.

Pimentel's suit proceeded against Mathias, and Pimentel and Mathias subsequently entered into a settlement agreement. In the agreement: (i) Mathias acknowledged legal responsibility for Pimentel's injuries and agreed that his actions were the sole legal cause of those injuries; (ii) Mathias assigned his rights against PSIC for the amount of any judgment obtained against him to Pimentel; and (iii) Pimentel agreed not to execute any judgment obtained against Mathias. The settlement left only "the issue of Pimentel's damages" to "be submitted to the Trial Judge" for "determination in an uncontested

hearing" at which Mathias and his counsel could "observe" but were precluded from "contest[ing] either liability or the amount of the damages."

At the uncontested hearing, the superior court entered judgment in favor of Pimentel in the amount of $564,499.95. Mathias and Pimentel subsequently sued PSIC. Mathias's complaint alleged a single cause of action for bad faith refusal to defend/indemnify. Pimental's complaint alleged a cause of action for "enforcement of [a] judgment under [section] 11580"[2] and a cause of action for "action on assignment of judgment" based on Mathias's assignment of rights to Pimentel. (Capitalization omitted.)

Pimentel and Mathias each separately moved for summary adjudication, asserting that PSIC had an obligation to defend Mathias and pay the judgment entered against him. PSIC also moved for summary judgment on Pimentel's and Mathias's claims on the ground that a loss resulting from Mathias's unjustified grabbing and pulling Pimentel was not covered by PSIC's policy, and consequently PSIC had no liability for the judgment against Mathias or for failing to defend him. The trial court denied Pimentel's and Mathias's motions for summary adjudication, ruling that the duty to defend was not demonstrated as a matter of law, and further that there was an unresolved question of "whether the conduct leading up to the judgment" against Mathias was "the result of

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2 Section 11580 provides that certain insurance polices must include, inter alia, "[a] provision that whenever judgment is secured against the insured . . . , then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment." (*Id*., subd. (b)(2).)

fraud or collusion." The court then granted PSIC's motion and entered judgment in favor of PSIC. Both Mathias and Pimentel appeal.

II

DISCUSSION

In lengthy and often overlapping briefing, Mathias and Pimentel purport to raise 33 separate arguments as to why the trial court erred in determining that PSIC was not obligated under its insurance policy to indemnify or defend Mathias. We address Mathias's and Pimentel's contentions below (consolidating the numerous contentions that are redundant) after setting forth the pertinent standard of review and the key undisputed facts regarding Pimentel's loss.

A. *Standard of Review*

In a motion for summary judgment, if a defendant makes "a prima facie showing" that one or more elements of the plaintiff's cause of action cannot be established, it "causes a shift, and the [plaintiff] is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) To meet that burden, the plaintiff "must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action.'" (*Id.* at p. 849.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

While we review a summary judgment ruling de novo, "de novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Further, we will not entertain arguments on appeal that were not raised before the trial court. "'[U]nless they were factually presented, fully developed and argued to the trial court, potential theories which could theoretically create "triable issues of material fact" may not be raised or considered on appeal.'" (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 70.)

B. *The Material Facts Before the Trial Court Regarding Pimentel's Loss*

A number of the arguments that Pimentel and Mathias raise on appeal rely on the faulty underlying premise that there was some ambiguity or material facts in dispute regarding the conduct on the part of Mathias that led to Pimentel's injury. In fact, given the positions taken by the parties and the evidence submitted in the proceedings below, there were no *material* factual disputes.

In its moving papers, PSIC characterized the conduct underlying Pimentel's claim against Mathias as follows: After entering M.J.'s bar in Chula Vista, Mathias walked "up behind Pimentel and <u>forcibly</u> grabbed him by the front of his jacket, turned him around

on the bar stool and began to throw him to the ground."[3] While Mathias and Pimentel dispute the "fact" that Mathias threw Pimentel to the ground, their characterization of Mathias's conduct does not otherwise differ with respect to any *material* fact.

In Mathias's opposition to PSIC's motion for summary judgment, Mathias asserted that after entering M.J.'s bar and observing Pimentel "talking to his fiancé[e]," he "stepped between Pimentel and Mathias' fiancé[e]." Mathias then "plac[ed] his hands on the lapel of Pimentel's jacket in order to turn Pimentel around to get Pimentel's attention" and "ask Pimentel why [he] was talking to Mathias' fiancé[e]." After Mathias "grabbed Pimentel's jacket," Pimentel was startled, lost his balance and fell from the bar stool, injuring his leg.[4] Pimentel's position as to what occurred was virtually identical: while Pimentel was talking to Mathias's fiancée, Mathias "reached between us and grasped the lapels of my jacket and started turning me around on the bar stool"; Pimentel "was startled" and while trying to stand up in reaction to Mathias's grabbing him, "lost my balance and fell along with [Mathias] who was still holding my jacket." Pimentel asserted he "severely injured [his] right ankle" in the fall.

In addition, both Mathias and Pimentel submitted and relied upon their settlement agreement during the summary judgment proceedings. In that agreement, Mathias and

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3 PSIC based its characterization in part on a police report regarding the incident that describes the incident as essentially a bar fight initiated by a jealous Mathias.

4 Mathias's own declaration submitted to the trial court stated: "I placed my hands on Pimentel's jacket"; "Pimentel was startled when he did not recognize me and attempted to stand up from the barstool, lost his balance, fell . . . and was injured."

Pimentel stipulated that Mathias "spun Pimentel around on the stool to get his attention," and that "[t]his action by Mathias caused Pimentel to lose his balance and fall from the stool, severely fracturing and otherwise injuring his right ankle." The settlement further states that Mathias's "actions were the sole legal cause" of Pimentel's injury and resulting damages, an admission that is repeated in the court judgment on Pimentel's claim.[5]

Given the parties' representations, the undisputed material facts regarding Mathias's conduct were as follows: Mathias entered a bar in Chula Vista, observed Pimentel speaking to his fiancée, and reacted to this perceived slight by grabbing Pimentel by the lapels of his jacket and spinning him around on his bar stool, causing a startled Pimentel to fall and injure his leg. All the parties agree that Mathias was not acting in self defense, or in defense of a third party.

Pimental's declaration added that "Mathias' conduct was technically an assault because he put his hands on my jacket and pulled me around on the bar stool."

[5] Mathias contends in his reply brief that admissions in the settlement agreement should not be considered because settlement communications are inadmissible. However, as Mathias and Pimentel both submitted and relied on the settlement agreement in the trial court, they cannot now be heard to argue that it is inadmissible. (*People v. Williams* (1988) 44 Cal.3d 883, 912 ["It is axiomatic that a party who himself offers inadmissible evidence is estopped to assert error in regard thereto"].) In addition, even without the settlement agreement admissions, there was no disputed material fact regarding whether Mathias was the cause of Pimentel's injury as there was no evidence upon which "a reasonable trier of fact" could have found otherwise. (*Aguilar, supra,* 25 Cal.4th at p. 850; *Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647 [inference "'derived from speculation'" cannot be grounds for denial of summary judgment motion].)

C. *The Loss Caused by Mathias Was Not Covered or Potentially Covered by PSIC's Insurance Policy*

Given the undisputed facts regarding Mathias's conduct, the trial court did not err in determining that PSIC had no duty to defend Mathias against Pimentel's lawsuit or indemnify him for the resulting judgment because section 533 precluded coverage for the claimed loss.

An insurance carrier has a duty to indemnify its insured for covered losses, as well as a broader duty to defend a lawsuit against its insured whenever "the underlying suit '*potentially* seeks damages within the coverage of the policy'" or "when the policy is ambiguous and the insured would reasonably expect coverage based on the 'nature and kind of risk covered by the policy.'" (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 38 (*La Jolla Beach & Tennis Club*).)

While the duty to defend is broad, it is "not without limits." (*La Jolla Beach & Tennis Club*, *supra*, 9 Cal.4th at p. 39.) "'[W]here there is *no potential* for coverage, there is no duty to defend.'" (*Id.* at p. 40.) Consequently, an "insurer *may* reject a tender of defense or withdraw from defending a claim once it is able to demonstrate, by reference to undisputed facts, that the claim *cannot* be covered." (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1186-1187; *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1106 (*Michaelian*) ["the insured '"may not speculate about unpled third party claims to manufacture coverage" [citation], and the insurer has no duty to defend where the potential for liability is "tenuous and

farfetched"'"; "[t]he ultimate question is whether the facts alleged 'fairly apprise' the insurer that the suit is upon a covered claim"].)

In the instant case, the trial court determined that PSIC had no duty to defend (or indemnify) Mathias because coverage for his actions was precluded by section 533, which provides that an insurer is not liable for a "loss caused by the wilful act of the insured."[6] Section 533 is "'an implied exclusionary clause which by statute is to be read into all insurance policies'" (*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1019 (*J. C. Penney*)) and is "equivalent to an exclusionary clause in the contract itself." (*Evans v. Pacific Indemnity Co.* (1975) 49 Cal.App.3d 537, 540 (*Evans*).) Although some intentional acts are not included within section 533, the section precludes coverage for damages resulting from any act of an insured that is intentional, wrongful and inherently harmful. (*J. C. Penney*, at p. 1025.) This is consistent with "[t]he public policy underlying section 533," which "is to discourage willful torts." (*Id.* at p. 1021.)

Pimentel and Mathias argue that the trial court erred in concluding that section 533 precluded coverage or potential coverage in the instant case because although Mathias engaged in a deliberate and intentional act in grabbing and turning Pimentel, it was not a "wilful act" under section 533 because Mathias did not act with an intent to cause serious

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6 The statute reads in full: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." (§ 533.)

harm and his mere "negligent touching" of Pimentel was not inherently harmful. We disagree.[7]

The undisputed facts demonstrated that section 533 precluded coverage because the loss was the result of Mathias's intentional, wrongful and inherently harmful act. Mathias, without any lawful justification, angrily responded to Pimentel's perceived approaches to his fiancée by grabbing him from behind and pulling him around on a bar stool. Such an action, while *perhaps* not likely to result in severe injury, qualifies as an inherently harmful and thus willful act under section 533.

Pimentel and Mathias are correct that in the leading case regarding "inherently harmful" acts, our Supreme Court addressed an act of sexual molestation that is, of course, *more* inherently harmful, than the act at issue here. (*J. C. Penney*, *supra*, 52 Cal.3d at p. 1025.) Nevertheless, as our colleagues in the Second District have explained, *J. C. Penney* is not properly viewed in isolation, but "represented a definitive clarification of California law with respect to the proper analytical approach to resolving issues raised under section 533." (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 501.)

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[7] Mathias's suggestion that the application of section 533 to undisputed facts is a question for the trier of fact is incorrect. The question of whether undisputed facts give rise to a duty to defend, including whether a particular insured's act is "inherently harmful," is a legal question for the court. (*Lomes v. Hartford Financial Services Group, Inc.* (2001) 88 Cal.App.4th 127, 132 ["Whether an insurance policy provides that potential for coverage and, thus, a duty to defend exists, is a question of law for the court to decide"]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*) ["When determining whether a particular policy provides a potential for coverage and a duty to defend, we are guided by the principle that interpretation of an insurance policy is a question of law"].)

In the 15 years since *J. C. Penney*, "other courts have had no trouble extending the[] same principles" applied in *J. C. Penney* "to different factual circumstances where the defendant's act was both intentional and wrongful and the harm caused was inherent in or predictably resulted from the act." (*Downey Venture*, at p. 501.)

Here, Mathias's hostile act of grabbing and spinning Pimentel on his bar stool places this case comfortably within this now well-established line of cases where "the insurer's liability to indemnify for damages arising from the insured's intentional, wrongful and inherently or predictably harmful conduct [has been] rejected in reliance on the statutory proscription in section 533." (*Downey Venture*, *supra*, 66 Cal.App.4th at p. 502 [citing 16 cases holding acts inherently harmful for purposes of section 533, covering acts such as "assault, battery and intentional infliction of emotional distress"; "aid[ing] and abet[ing] assault with a deadly weapon"; "nonaccidental shooting of third party"; "willful violation of an employee's right to a safe workplace"; "defendant's felonious conduct" resulting in personal injury; "patent infringement"; "sexual harassment"; "bad faith litigation tactics"; "employment discrimination and retaliatory discharge"; "intentional physical assault"; shooting "while merely 'intending' to frighten"; "'high risk sex'"; "fraud and misrepresentation"; "disparate treatment discrimination claims"; "intentional violations of the Sherman Antitrust Act"; "racially motivated hate crimes"; and concluding that section 533 barred coverage for "a claim for malicious prosecution"].) For example, in *Fire Ins. Exchange v. Altieri* (1991) 235 Cal.App.3d 1352, 1359 (*Altieri*), our colleagues in the Sixth District determined that section 533 precluded insurance coverage for the acts of a juvenile who punched a classmate while

wearing a boxing glove. The Sixth District explained that the insured "may not have intended to hurt [the victim] 'bad' but he did intend, without *any* legal justification, to hit him. Altieri's conduct was inherently harmful and wrongful. His assault upon [the victim], without any legal justification, is an uninsurable willful act under section 533." (*Altieri*, at pp. 1359-1360; see also *Michaelian*, *supra*, 50 Cal.App.4th at p. 1107 [insurance company had no duty to defend action insured against allegations of assault and battery because "[c]overage for these causes of action is . . . precluded by . . . section 533"]; cf. *Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 810 ["'section 533, and the public policy it represents, bar the attempt to shift liability for intentional sexual harassment and associated employment-related torts (claims of wrongful discharge, infliction of emotional distress, *battery*, and sexual assault) to an insurer,'" quoting *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1603, italics added]; *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661, 674 [section 533 required that insurer had no duty to defend or indemnify insured for his act of aiding and abetting a retaliatory drive-by shooting]; *Evans, supra*, 49 Cal.App.3d at p. 540 [noting that parties did not dispute that section 533 precluded coverage where injuries resulted from battery by insured during bar fight].)

While we recognize that grabbing and spinning a person on a bar stool is less harmful than punching someone with a boxing glove, we do not believe this distinction of degree is sufficient to change the outcome of our analysis. Rather, we think the similarities between the conduct at issue here and that in *Altieri* control. As in *Altieri*, Mathias's act was a hostile, unjustified and forceful physical intrusion upon Pimentel's

person, easily sufficient to constitute a criminal battery. (Pen. Code, § 242 ["A battery is any willful and unlawful use of force or violence upon the person of another"]; CALCRIM Nos. 926, 960 [use of force lawful when done in self-defense or defense of others]; cf. *United States v. Lewellyn* (9th Cir. Mar. 7, 2007, No. 06-30185) __ F.3d ___ [2007 WL 675983, *2] ["'The least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner,'" quoting 3 Blackstone's Commentaries 120].)[8] Thus, on the undisputed facts of this case, Mathias's conduct was "inherently harmful" and thus "wilful" under section 533.

In sum, we conclude that like the insured's act in *Altieri*, Mathias's act of grabbing and spinning Pimentel was intentional, wrongful and inherently harmful, and whether Mathias actually intended the harm that followed was irrelevant. (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 740-741 (*Shell Oil*) ["section 533

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8 Mathias and Pimentel posit hypothetical situations where grabbing someone would not constitute battery and might even constitute favorable conduct, such as grabbing a pedestrian who is about to walk into traffic. These hypothetical pontifications are beside the point. Our focus is on Mathias's conduct in the instant case, not whether there is some type of grabbing, or a subset of criminal batteries, that would not properly be classified as inherently harmful. The question presented here is simply whether the trial court correctly concluded that the undisputed conduct at issue (Mathias's hostile grabbing and spinning of Pimentel on his bar stool) was properly characterized as inherently harmful and thus "wilful" under section 533. As we conclude that it was, we need not resolve whether other grabbing conduct or particularly "harmless" batteries arising out of mere offensive touching would constitute inherently harmful conduct under section 533.

precludes indemnification, whether or not the insured subjectively intended harm, if the insured seeks coverage for an intentional, wrongful act that is inherently and necessarily harmful"]; *Altieri*, *supra*, 235 Cal.App.3d at p. 1358; *J. C. Penney*, *supra*, 52 Cal.3d at p. 1025.)[9] Section 533 precluded coverage regardless of whether Mathias intended by his battery to severely injure Pimentel, or merely to physically confront, scare and/or slightly injure him as some kind of warning or retribution for speaking to Mathias's fiancée.

As section 533 precluded coverage for Mathias's "wilful act," there was no coverage or potential coverage for the loss, and as a result no duty to defend or indemnify. Consequently, the trial court did not err in granting PSIC's motion for summary judgment and denying Mathias's and Pimentel's cross-motions for summary

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9 Mathias and Pimentel rely on *Shell Oil*, mistakenly asserting that it stands for the proposition that an intent to injure is required for section 533 to preclude coverage. In fact, however, *Shell Oil* recognizes that where an act is inherently wrongful, no intent to injure is required. (See *Shell Oil*, *supra*, 12 Cal.App.4th at pp. 742-743 ["We conclude that section 533 prohibits indemnification of *more than* just intentional acts that are subjectively desired to cause harm and *acts that are intentional, wrongful, and necessarily harmful regardless of subjective intent*. A 'wilful act' under section 533 must *also* include a deliberate, liability-producing act that the individual, before acting, expected to cause harm," italics added].)

Mathias and Pimentel also rely on *Allstate Ins. Co. v. Overton* (1984) 160 Cal.App.3d 843, 849 and *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 887 (the case on which the *Allstate* court relied) for the proposition that an intentional battery may be covered by insurance despite section 533 if it does not involve a specific "intent to harm." However, the language in *Clemmer* on which this argument is based was clarified in *J. C. Penney*, *supra*, 52 Cal.3d 1009, where our high court explained that *Clemmer*'s requirement of an intent to harm was limited to situations where the mental capacity of the insured was at issue. (See *J. C. Penney*, at p. 1025.) There was, of course, no issue raised as to Mathias's mental capacity in the instant case.

adjudication. (*Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661-662 (*Havstad*) [once trial court properly determined on motion for summary judgment that there was no potential for coverage, it properly denied claim for bad faith refusal to defend].)[10]

D. *The Additional Arguments Raised by Mathias and Pimentel on Appeal Are Unavailing*

Our determination that section 533 precluded any possibility of coverage for Pimentel's injuries resolves the primary dispute on appeal. In addition to pressing that

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10 Mathias and Pimentel emphasize that PSIC's decision not to defend Mathias cannot be justified in hindsight, but must be evaluated based on the facts available to PSIC at the time it denied coverage. (See *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 ["'the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit'"].) Even if Mathias and Pimentel are correct on this point, the facts available to PSIC at the time it denied coverage were virtually identical to the undisputed material facts before trial court, and included a complete description of the incident by Mathias that demonstrated the intentional, wrongful and inherently harmful nature of Mathias's unprovoked battery. Prior to its denial of coverage, Mathias informed PSIC that when he saw Pimentel with his fiancée, he "reached over in front of [Pimentel] and physically grabbed both sides of [Pimentel's] jacket and spun [Pimentel] around on the barstool to face him"; while Mathias "was still grasping [Pimentel's] jacket, [Pimentel] started to stand up and they fell to the ground" resulting in Pimentel's leg injury. In addition, although Pimentel's lawsuit against Mathias alleged a cause of action for negligence, its cause of action for battery based on the same conduct alleged that Mathias "with his hands pushed and/or pulled [Pimentel] causing [him] to fall from the stool where he was seated to the floor." Mathias also informed PSIC that he was not acting in self-defense. Thus, the coverage denial was proper based on the facts available to PSIC at the time of its denial. (See *Waller*, *supra*, 11 Cal.4th at p. 19 ["where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability"]; *State Farm Mut. Auto. Ins. Co. v. Longden* (1987) 197 Cal.App.3d 226, 233-234 [insurer not required to defend "where the only potential for liability turns on resolution of a legal question" based on undisputed facts].)

claim, however, Mathias and Pimentel also raise a number of alternative grounds for reversal. As discussed below, we find these contentions to be meritless.

1. *PSIC Was Not Barred by the Judgment in the Underlying Lawsuit from Contending that Pimentel Was Injured by a Willful Act*

Pimentel argues that the trial court's summary judgment ruling in favor of PSIC on the ground that Mathias's willful act precluded coverage was barred by the earlier judgment in Pimentel's lawsuit against Mathias awarding damages for negligence. We disagree.

Pimentel relies on *Geddes & Smith, Inc. v. St. Paul-Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 561, which states that "[a]n insurer that has been notified of an action and refuses to defend on the ground that the alleged claim is not within the policy coverage is bound by a judgment in the action, in the absence of fraud or collusion, as to all material findings of fact essential to the judgment of liability of the insured." However, the principle announced in *Geddes* does not apply here, because the issue of coverage was not litigated in the underlying lawsuit and the trial court made no material findings of fact relevant to that issue. (*Id.* at p. 562 ["The issues that defendant litigated in the trial court and that are raised in this appeal concern the scope of policy coverage and were not adjudicated in the prior action"]; *Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1313-1314 [declining to estop insurer from raising defense to coverage potentially inconsistent with stipulated judgment because the party seeking estoppel did not prove that the disputed "issue was raised, actually submitted for

determination and determined and that contrary evidence on the issue was not restricted"].)[11]

In the instant case, the trial court did not make any finding or otherwise *determine* that Pimentel's loss was caused by Mathias's negligence. As noted earlier, the settlement agreement that formed the basis for the stipulated judgment proceeding confined that proceeding to the "issue of . . . damages" and barred Mathias from contesting liability. Thus, prior to adjudicating the issue of *damages*, the court merely recited that Pimentel elected to "proceed[] to trial on [a] negligence cause of action only" and "[p]rior to trial, [Mathias] formally admitted liability." Because the underlying judgment consequently contained no findings or judicial determination relevant to the issue, PSIC was not precluded from contesting coverage on the ground that the loss was caused by a willful, i.e., nonnegligent, act. (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 615 [insurer "is only bound by 'necessarily adjudicated' findings in the underlying judgment, not by the stipulations of the parties preceding the judgment"].)

2. *There Was No Viable Bad Faith Claim Against PSIC Because the Policy Did Not Cover the Underlying Loss*

Pimentel argues that because PSIC invoked the illegal acts exclusion, which had previously been deemed unenforceable by the Supreme Court, in its initial denial of

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11 Pimentel also relies on *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, but because PSIC did not sign and was not a party to the stipulated judgment, that case is inapposite. (*Id.* at pp. 664-665 ["Where, as here, an insurer signs a stipulation in which the insured admits liability, that insurer is privy to the agreement and can be collaterally estopped from relitigating liability to the same extent as the insured"].)

coverage, it engaged in a "bad faith refusal to defend as a matter of law," mandating a ruling against PSIC. This contention fails because once it was established that there was no potential for coverage, the bad faith claim failed.

"[I]f there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing . . . ." (*Waller, supra*, 11 Cal.4th at p. 36.) This is because a bad faith refusal to defend/indemnify claim is derivative of an underlying contractual obligation, and absent such, an obligation has no independent force.[12] (*Waller, supra*, 11 Cal.4th at p. 36; see also 2 Witkin, Summary of Cal. Law, Insurance, § 248, p. 367 ["Because the implied covenant of good faith and fair dealing is based on the contractual relationship between the insured and the insurer, a bad faith claim cannot be maintained unless policy benefits are due"]; *San Diego Housing Com. v. Industrial Indemnity Co.* (1998) 68 Cal.App.4th 526, 544 ["Bad faith claims are based on the contractual covenant of good faith and fair dealing. [Citation.] Where a breach of contract cannot be shown, there is no basis for a finding of breach of the covenant"]; *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 657 ["where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance"].)

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[12] Pimentel's contention that because PSIC's decision to deny Mathias a defense was in bad faith, it was automatically liable for the resulting judgment, thus fails as well; so, too, does his contention that disputed facts with respect to whether PSIC subjectively acted in bad faith in denying coverage precluded summary judgment.

3. *PSIC Did Not Waive the Right to Invoke Section 533 by Failing to Specifically Assert It in Its Initial Denial*

Mathias contends that PSIC should not be permitted to raise section 533 in this litigation because it did not rely on that ground to deny coverage in its initial formal response to Mathias's coverage request. We reject this contention as it is well settled that an insurer's failure to raise a defense to coverage in an initial denial does not preclude subsequent reliance on that defense. (*Waller, supra*, 11 Cal.4th at p. 31 ["an insurer does not impliedly waive coverage defenses it fails to mention when it denies the claim"].) The waiver of a defense to coverage must be shown, as with other waivers, by evidence that "'a party intentionally relinquishes [the] right'" or that the "'party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'" (*Id.* at pp. 33, 34.) Here, Mathias failed to present evidence that would support a finding that PSIC intentionally relinquished its right to rely on section 533 to defend its coverage denial, simply asserting that PSIC's conduct was generally improper thus requiring a finding of waiver. (*Waller, supra*, 11 Cal.4th at pp. 33-34.)

4. *The Trial Court Did Not Abuse Its Discretion in Declining to Estop PSIC From Raising Section 533 as a Sanction for Alleged Misconduct*

Mathias also argues that the trial court should have applied equitable principles of estoppel to bar PSIC from invoking section 533 because PSIC based its denial of

coverage on interviews with Mathias that were conducted without counsel present and because PSIC improperly referenced an "illegal acts" exclusion in its initial denial.[13]

We review a trial court's refusal to apply the doctrine of equitable estoppel for abuse of discretion. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 724.) Mathias fails to demonstrate any abuse of discretion here.

The trial court is granted broad discretion to determine the appropriate equitable sanction, if any, for improper conduct. Thus, even if we were to conclude that PSIC engaged in improper conduct by speaking to its insured without his counsel present and by invoking the illegal acts exclusion, we would still conclude that the trial court acted within its discretion in rejecting the extreme sanction sought — precluding PSIC's reliance on the facts it learned from its insured and preventing it from invoking section 533. Such a sanction would have constituted the equivalent of a directed verdict resulting in a substantial judgment, otherwise contrary to the facts and law, in favor of Mathias and Pimentel. The ruling would also have the result of frustrating the purpose of a statute intended "to discourage willful torts." (*J. C. Penney, supra*, 52 Cal.3d at p. 1021.) We cannot conclude on this record that this extreme sanction was mandated *as a matter of law* as would be required for reversal.

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13 Prior to PSIC's denial of Mathias's claim, our Supreme Court ruled that a provision precluding coverage for "'illegal act[s]'" is too vague to be enforceable because the definition of "'illegal'" could potentially include acts prohibited under civil and not just criminal law. (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 766.)

E. *Contentions Not Raised in the Trial Court May Not Be Relied upon for Reversal on Appeal*

Mathias raises a number of arguments for the first time on appeal and we briefly address these contentions below.

1. *PSIC's "Separate and Independent Promise to Defend"*

Mathias contends that even if he was not eligible for any liability coverage under his policy, he was still entitled to a *defense* of the claim because the policy contained a "separate and independent promise to defend," even where no coverage existed. Recognizing that a provision in a homeowner's policy providing for a defense despite the absence of coverage would be unusual, Mathias adds that even if the policy did not, in fact, include such a promise, its language was sufficiently ambiguous that he reasonably believed it did, triggering a duty to defend.[14]

Whatever the merits of this contention, we reject it because Mathias did not raise the argument in the trial court. (*Havstad, supra*, 58 Cal.App.4th at p. 661 [appellate court need not consider alternative argument on insurer's duty to defend that was not raised in trial court because "'"possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal"'"].) Mathias and Pimentel argued in the trial court that Mathias reasonably expected PSIC to provide a

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[14] Although his brief is unclear on this point, Mathias may also be arguing that he had a reasonable expectation of a defense because the policy was ambiguous with regard to whether "wilful acts" under section 533 were, in fact, covered despite the statutory preclusion. If so, we reject that claim. Section 533 is automatically "part of every insurance contract and is equivalent to an exclusionary clause in the contract itself." (*Evans, supra*, 49 Cal.App.3d at p. 540.)

defense *because the loss was covered*, or at least potentially covered, by the terms of the policy.[15] Neither party's arguments in the trial court can be fairly construed to contend, as Mathias now argues on appeal, that even if the incident was not covered (or potentially covered) by the policy, the policy nonetheless provided a separate and independent promise to defend uncovered claims.[16]

Mathias contends in his reply brief that even if he did not raise this argument in the trial court, the court was required to discern the argument itself from the text of the insurance policy. Mathias's contention misunderstands summary judgment procedure. PSIC's motion for summary judgment created a prima facie showing that by virtue of the section 533 exclusion, there was no potential for coverage and thus no duty to defend.[17]

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15 For example, Mathias contended in his opposition to PSIC's motion for summary judgment that Mathias "reasonably expected PSIC to provide a defense because the accident fell within the terms of the policy," and requested in his conclusion to the opposition that the trial court "find that PSIC owed Mathias a duty to defend . . . because of the 'potential' for coverage."

16 We have reviewed the materials referenced in a string citation in Mathias's reply brief that purport to reference places in the record where Mathias raised the argument. The only pleading cited (the bulk of the citations are to quotes of the generic text of the insurance policy included in various declarations, and statements of facts) does not contend that PSIC had separately promised to defend even uncovered claims. Rather, it argues that because Pimentel's complaint alleged both intentional (i.e., not covered) and negligent (i.e., covered) conduct by Mathias, PSIC was obligated to defend the entire action because an insurer must provide a defense "even in those cases where potentially covered acts occur, 'in such close temporal and spatial proximity' to acts clearly not covered as to compel the conclusion the acts are 'inseparable.'"

17 Mathias also contends that PSIC failed to meet its initial burden on summary judgment because PSIC itself presented evidence that Pimentel was injured not by Mathias's act, but when he "lost his balance." In fact, the record evidence cited by Mathias only states that Pimentel lost his balance when Mathias grabbed and turned him,

The burden then shifted to Mathias, *not the trial court*, to "make a prima facie showing of the existence of a triable issue of material fact" on that question. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) As Mathias did not do so, the trial court did not err in granting PSIC's motion, and it would be improper for us to conclude otherwise based on an argument that Mathias raises for the first time on appeal.[18]

2. *The $1,000 Medical Expense Provision*

Mathias points out in two separate argument sections of his brief that his insurance policy included a provision of $1,000 for medical expenses caused to another regardless of liability. An argument based on this provision was not raised in the trial court and thus cannot constitute a basis for reversal on appeal. Mathias also fails to explain how the $1,000 medical expense provision would apply in this context, instead simply asserting the existence of the provision. This failure provides a separate and independent ground for rejection of the argument on appeal. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [it is not the role of reviewing court to independently seek out support for appellant's conclusory assertions, and such contentions may be rejected without consideration]; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [same].)

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and thus did not defeat PSIC's prima facie showing that Pimentel's injury was the result of Mathias's willful act.

[18] As this contention is forfeited, we need not (and do not) reach the underlying question of whether the policy promised (or Mathias had a reasonable expectation that it promised) a defense of even claims that were not covered/potentially covered.

F. *Inconsistencies in the Trial Court's Rulings Do Not Warrant Reversal*

Pimentel also argues that inconsistencies in the trial court's various summary adjudication/summary judgment rulings, including its statement that issues of fact precluded granting Pimentel's motion, but not PSIC's motion, require reversal. We disagree.

Even if we accepted Pimentel's contention that the trial court's reasoning is inconsistent on the various points raised, it is well established that inconsistent or erroneous reasoning that leads to a correct result is not grounds for reversal. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 [trial court's correct rulings must be affirmed even if reached "'upon an improper or unsound course of reasoning'"; "If right upon any theory of the law applicable to the case, [a ruling] must be sustained regardless of the considerations which may have moved the trial court to its conclusion"].)

G. *Any Error in the Trial Court's Evidentiary Rulings Was Not Prejudicial*

Finally, Pimentel objects to two evidentiary rulings made by the trial court in the summary judgment proceedings, allowing a police report and excluding certain deposition testimony. Pimentel fails to state how these rulings prejudiced its claims, asserting solely that this court "cannot assume those errors were not prejudicial."

As evidentiary error does not warrant reversal unless there has been prejudice, and it is the appealing party's burden to demonstrate that prejudice, we reject Pimentel's claims of evidentiary error on the ground that there is an inadequate showing of prejudice (i.e., no showing at all). (See Cal. Const., art. VI, § 13 ["No judgment shall be set aside,

. . . in any cause, on the ground of . . . improper admission or rejection of evidence, . . . unless . . . the error complained of has resulted in a miscarriage of justice"]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1678 [appellant's burden to demonstrate prejudice under California Constitution]; *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1403 [appellants' failure to identify evidentiary error that prejudiced them constituted waiver of contention on appeal].)[19]

DISPOSITION

Affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

19 Pimentel and Mathias argue a number of their contentions not only as challenges to the trial court's grant of PSIC's motion on their claims, but also separately as assignments of error with respect to the trial court's denial of their cross-motions for summary adjudication on those same claims. We see no reason to readdress these contentions in the context of Pimentel's and Mathias's cross-motions for summary judgment. It necessarily follows from our discussion above that because the trial court properly granted PSIC summary judgment on the claims against it, the court did not err in denying Pimentel's and Mathias's cross-motions for summary adjudication against PSIC on those same claims.